IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO. 5197 OF 2006.
IN
FIRST APPEAL NO. 806 OF 2005.

Nathuram B.Joshi. ... Applicant.
Versus.
Maharashtra Housing and Area Development Board. ... Respondent.

Shri R.V.Govilkar i/by M/s.Bhuta & Associates for the Applicant

Shri G.W.Mattos, A.G.P. for the Respondent.

CORAM : ABHAY S.OKA, J.

DATED : 5th March, 2007.

P.C.:

1. Heard the learned Advocates appearing for the parties. Submissions of the learned Advocates were completed on the last date. The Applicant/Appellant is the original Plaintiff who filed a suit for injunction restraining the Respondent from dispossessing him from peaceful possession of the suit premises, being a premises admeasuring 7'x10' on the ground floor of Rachana Building, New Chikhalwadi, Narayan Dhabolkar Road, Mumbai 400 007. By the judgment and decree, which is impugned in the First Appeal, the suit came to be dismissed. By a separate order I have admitted the Appeal.

2. In the present Civil Application, the prayer of the Applicant is for restoration of the possession of

the suit premises. Initially the Appeal was dismissed for default which was restored by order dated 21st November 2006. According to the case of the Applicant, he was under an impression that once the order of dismissal was set aside, the ad-interim relief which was granted prior to the dismissal of the Appeal was also restored. The grievance made in the application is that on 2nd December 2006 the officers of the Respondents forcibly evicted the Applicant.

3. It will be necessary to refer to the orders passed in the First Appeal by this Court from time to time. On 15th April 2005, as the Advocate who appeared for the Applicant stated that she was not in a position to argue the matter as her Counsel was not available, the matter was kept back on on that day. On 28th April 2005, on the request of the Advocate for the Appellant, the Appeal was adjourned. On 5th May 2005, ad-interim order passed by this Court is that the decree passed by the trial Court shall not be executed. Thereafter, the matter was adjourned from time to time. On 10th February 2006 a conditional order was passed regarding non-removal office objections. On 14th November 2006 an adjournment was sought on the ground that the Senior Advocate appointed by the Appellant was not present and therefore, this Court dismissed the Appeal for non-prosecution. By an order dated 21st November 2006

passed in Civil Application No.5010 of 2006, the Appeal was restored subject to payment of costs of Rs.3000/-. A perusal of the farad sheet shows that the only order which was operating in favour of the Appellant was of the stay of execution of the decree. The decree passed is of dismissal of the suit and therefore, the order of stay cannot be construed to mean that there was any protection granted to the possession of the Applicant.

4. Shri Govilkar submitted that during the pendency of the Appeal, by taking help of Police force, the Applicant has been dispossessed by the officers of the Respondent-MHADA without following the due process of law. He submitted that when the Appeal was pending before this Court such a drastic and high-handed action ought not to have been taken. Shri Mattos justifies the action by submitting that there was no interim or ad-interim relief operating in favour of the Applicant and that the Applicant had no right in respect of the suit premises. The submission of Shri Mattos made on earlier occasion is noted in paragraph 2 of the order dated 9th February 2007 which reads thus:

> 2. **Shri Mattos appearing for MHADA states that MHADA has an authority in law to dispossess a person without following due process of law who is allegedly in unlawful**

> **possession of the premises.** He qualifies his statement by saying that it is not at all necessary to follow due process of law before dispossession if the case is not covered by section 66 of the MHADA Act." (Emphasis added).

5. I have perused the affidavit filed by the Deputy Engineer of the Respondent-MHADA in which it is stated that on 2nd December 2006 possession of the suit premises was taken by the Respondents under the Police protection. It is not in dispute that the due process of law has not been adopted by the Respondents in respect of the suit premises. Whether the aforesaid submission of Shri Mattos is tenable or not is certainly required to be considered.

6. If any mandatory relief is to be granted to the Applicant, apart from the conduct of the Respondents, a prima-facie right to occupy the suit premises will have to be established by the Applicant. In the impugned Judgment and Decree, the trial Court has held that the Applicant has no right in respect of the suit premises.

7. In the plaint in paragraph 2, the Applicant has stated thus:

> "2. The Plaintiff states that in the year 1980 the Plaintiff was working with the Ajanta Builders as a supervisor and as a watchman. Somewhere in the year 1980 Ajanta Builders entered into the contract to build the Rachana Building which was earlier in the form of chawl and known as "Wadi". Since the Plaintiff was working with Ajanta Builders the Plaintiff was deputed as the supervisor and as watchman when Rachana Building was undergoing the constructions. The Plaintiff was given the room on the ground floor."

A perusal of the entire plaint shows that the Appellant has not relied upon any letter of allotment or any document under which the suit premises were allotted to the Applicant. In fact in the plaint no specific right in respect of the suit premises has been claimed by the Applicant. The Applicant is not disputing that the ownership of the suit premises vests in the Respondents. The documents which are produced by the Applicant before the trial Court only show the possession of the Applicant. Prima-facie, there is absolutely no evidence on record to show that the Applicant was lawfully entitled to occupy the suit premises.

8. Grant of injunction whether mandatory or

prohibitory is obviously a discretionary relief under the provisions of the Specific Relief Act, 1963 as also under Order XXXIX of the Code of Civil Procedure, 1908. While considering the prayer for grant of discretionary relief, equitable considerations will have to be taken into consideration. Since the Applicant on his own showing has not established existence of a prima-facie legal right to occupy the suit premises, a drastic relief of restoration of possession cannot be granted in favour of the Applicant before the Appeal is decided finally. Therefore, the prayer for restoration of possession cannot be granted. It is, however, obvious that all further actions of the Respondents will be subject to final outcome of the Appeal.

9. Before parting with this order, it must be noted that the MHADA has taken a very bold stand before this Court. MHADA is a creation of a statute. What has been contended before me is that unless a case is covered by section 66 of the Maharashtra Housing and Area Development Act, the Respondent-MHADA is not bound to follow due process of law before throwing out a person, who according to MHADA is an unlawful occupant. The learned Counsel for the Respondents has placed reliance on a decision of this Court dated 10th April 1997 in Appeal from Order No.356 of 1997. I have perused the said decision. The said decision is not an authority

for proposition that it is not necessary for MHADA to follow due process of law before evicting an unauthorised occupant. It will be necessary to refer to the decision of the Apex Court in the case of S.R.Ejaz v/s. T.N.Handloom Weavers' Cooperative Society Ltd. [(2002) 3 S.C.C. page 137. In paragraph 8 of the said decision, the Apex Court has observed thus:

> "8. In our view, if such actions by the mighty or powerful are condoned in a democratic country, nobody would be safe nor can the citizens protect their properties. Law frowns upon such conduct. **The court accords legitimacy and legality only to possession taken in due course of law. If such actions are condoned, the fundamental rights guaranteed under the Constitution of India or the legal rights would be given a go-by either by the authority or by rich and influential persons or by musclemen. Law of jungle will prevail and "might would be right" instead of "right being might".** This Court in State of U.P. v/s. Maharaja Dharmander Prasad Singh dealt with the provisions of the Transfer of Property Act and observed that a lessor, with the best of title, has no right to resume possession extrajudicially by use of

> force, from a lessee, even after the expiry of earlier termination of the lease by forfeiture or otherwise. Under law, the possession of a lessee, even after the expiry or its earlier termination is juridical possession and forcible dispossession is prohibited. **The Court also held that there is no question of the Government withdrawing or appropriating to it an extrajudicial right or re-entry and the possession of the property can be resumed by the Government only in a manner known to or recognised by law."** (Emphasis added.)

There is no reason why the ratio of the said decision will not apply to MHADA. The Apex Court has held that there is no question of the Government withdrawing or appropriating to it an extrajudicial right of re-entry. The possession of the property can be resumed by the Government only in a manner known to or recognised by law. The Apex Court has time and again reiterated that even administrative orders and quasi-judicial orders affecting rights of an individual are required to be passed after following the rules of natural justice when the Authorities are required to evict a citizen from a property. It will be necessary to refer to the observation made by the Apex Court in the first paragraph of the decision in the case of Shiv Sagar

Tiwari v/s. Union of India and others, reported in [(1997) 1 S.C.C. page 444], which reads as under:

> "The administrative law has of late seen vast increase in discretionary powers. But then, the discretion conferred has to be exercised to advance the purpose to subserve which the power exists. Even the Minister, if he/she be the repository of discretionary power, cannot claim that either there is no discretion in the matter or unfettered discretion. This proposition was rejected emphatically by the House of Lords in the landmark decision of Padfield. This apart, as pointed out in United States v. Wunderlich:
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> > "Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some....official, some bureaucrat... Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions."

10. In a given case whether the Court can grant discretionary relief or equitable relief in favour of a

party is altogether a different question. But I am really surprised at the stand taken by MHADA which is referred to in the earlier paragraphs of this order. The Respondent-MHADA tried to justify its stand by filing an affidavit of Ashok Nagurao Karanjkar, Deputy Chief Officer. In paragraph 3 the officer has referred to the provisions of section 66 by contending that the provisions of section 66 are not being applied to the trespassers like the Applicant.

11. Though I am not granting any relief in favour of the Applicant, I hold that the stand taken by the Respondent-MHADA which is recorded in the order dated 9th February 2007 is completely contrary to the well settled law of the land.

12. Subject to what is stated above, the Application is rejected.

Judge.